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Chapter 7 Trustee

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

To THE HONORABLE RONALD H. SARGIS, United States Bankruptcy Judge:

Thomas A. Aceituno, the Chapter 7 Trustee (“Trustee”) in the above-captioned Chapter 7 case, hereby moves for an order approving the sale of all of the Estate’s causes of action against Deutsche Bank National Trust Co., defendant in Adv. Proc. No. 11-2024. The grounds for this motion are as follows:

1. Trustee is the duly-appointed Chapter 7 Trustee in the above-captioned case.
 2. The Chapter 7 Case was initiated as a Chapter 13 case on or about September 16, and was converted to a case under Chapter 7 on October 5, 2010, when the Bankruptcy

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1 Court granted Debtor's motion to convert the case to a case under Chapter 7. Trustee was
 2 immediately appointed as Trustee for the Chapter 7 Case.

3. On January 13, 2011, Debtor initiated an adversary proceeding (Adv. Proc. No.
 4 11-2024) ("the Adversary Proceeding") in the U. S. Bankruptcy Court for the Eastern District of
 5 California against Deutsche Bank National Trust Co., as Indenture Trustee for the Accredited
 6 Mortgage Loan Trust 2006-2 Asset-Backed Notes et al. (the "Defendant"). In the Adversary
 7 Proceeding, Macklin asserted various claims against Defendant regarding a loan against a
 8 residence ("the Residence") located at 10040 Wise Rd., Auburn, CA.

9. On June 17, 2011, Debtor filed a First Amended Complaint against Defendant,
 10 asserting causes of action for Violations of Truth in Lending Act; Violations of Real Estate
 11 Settlement Procedures Act; Violations of Fair Credit Reporting Act; Fraud; Unjust Enrichment;
 12 Civil RICO Violations; Violations of California Business & Professions Code § 17200; Breach
 13 of Security Instrument; Wrongful Foreclosure; and Quiet Title. These causes of action and any
 14 other claims which Debtor may assert against Defendant in connection with a loan against the
 15 Residence are hereinafter referred to as "the Claims."

16. As a result of the filing of the Chapter 7 Case, a bankruptcy estate ("the Estate")
 17 was created. The Estate owns all assets of Debtor as of the date of filing of the Chapter 7 Case.
 18 The Claims and the Residence are property of the Estate.

19. The Bankruptcy Court has authorized Trustee to intervene as a party plaintiff in
 20 the Adversary Proceeding. As a result, both Debtor and Trustee are acting as co-plaintiffs in the
 21 Adversary Proceeding.

22. Trustee is of the view that the interests of all parties would be best served by a
 23 single lawsuit against Defendant, with a single party in control of the litigation, rather than
 24 competing plaintiffs asserting the same causes of action. Further, the Trustee is of the view that
 25 the optimal mechanism to allow a single adversary proceeding against Defendant, with a single
 26 plaintiff to represent the interests of all, is to have the Debtor assert the claims of the Estate
 27 against Defendant.

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1 8. Trustee and Debtor have agreed to transfer the Estate's interest in the Claims to
2 Debtor, in exchange for Debtor's promise to pay all proceeds from the litigation to the Estate, up
3 to \$150,000, after payment of attorneys' fees and expenses of litigation. For purposes of the
4 agreement, attorney's fees are capped at one-third of the gross proceeds of the litigation; costs
5 will be reimbursed to the Debtor. Any settlement of the litigation will be subject to Bankruptcy
6 Court approval, including approval of the attorney's fees and costs.

7 9. An unsigned copy of the agreement assigning the Claims is submitted herewith as
8 Exhibit A.

9 10. This motion is based on 11 U.S.C. § 363(b), which authorizes the sale of assets of
10 the Estate outside the ordinary course of business after notice and a hearing.

11 11. The Trustee is presently on vacation. Attached to the Declaration of Gregory J.
12 Hughes submitted herewith is an unsigned copy of the Trustee's declaration, which he will sign
13 and submit on his return (on or shortly after August 22, 2011).

14 12. As stated in the Trustee's unsigned declaration, the terms of the sale are
15 reasonable and in the best interests of the Estate. The Estate owns the Claims, but has no assets
16 to litigate the Claims to a judgment. The Claims have little or no value if someone cannot pursue
17 them. The Debtor has initiated a lawsuit on the Claims, and his attorney is willing to pursue the
18 Claims—but the Debtor does not own the Claims. The obvious solution is to transfer the Claims
19 to the Debtor, for a price.

20 13. The negotiated price is payment by the Debtor of up to \$150,000 out of the net
21 proceeds from the litigation. This amount should be sufficient to pay all administrative expenses
22 in full, and all creditors' claims in full. Attorney's fees and costs related to the litigation will be
23 paid off the top, and then the Estate will receive the net proceeds, up to \$150,000. Attorney's
24 fees, for purpose of the agreement, will be capped at one-third of the gross proceeds of the
25 litigation. A contingency fee of 33.3% will compensate Debtor's counsel for the risk of non-
26 payment in the event the litigation is unsuccessful. The requirement of court approval for any
27 settlement will ensure that everyone's expectations, as reflected in the agreement, are met.

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1 14. As is the case for any sale of assets, the sale of the Claims will be subject to
 2 overbids. In order to put all potential purchasers on an even footing, Trustee proposes that any
 3 overbidders must agree to pay \$150,000 to the Estate, and pay cash for the differential between
 4 \$150,000 and the amount of the overbid, as stated in more detail in the following paragraphs.

5 15. Any overbidder must agree to pay \$150,000 to the Estate, payable immediately if
 6 the Adversary Proceeding is not to be prosecuted, or upon conclusion of the litigation, if the
 7 Adversary Proceeding proceeds to settlement or judgment. Thus, any overbidder who intends to
 8 obtain a dismissal of the Adversary Proceeding should plan on immediately paying \$150,000,
 9 plus the difference between \$150,000 and the overbid amount. Any overbidder who intends to
 10 pursue the Adversary Proceeding should plan on paying \$150,000 when the Adversary
 11 Proceeding is resolved by settlement or judgment. **FOR ALL OVERBIDDERS, THE**
 12 **OBLIGATION TO PAY \$150,000 IS NOT CONTINGENT ON THE RESULTS OF THE**
 13 **LITIGATION; THE OBLIGATION TO PAY \$150,000 WILL ARISE IMMEDIATELY**
 14 **UPON COURT APPROVAL OF THE OVERBID, AND THE \$150,000 WILL BE**
 15 **PAYABLE IMMEDIATELY UPON DISPOSITION OF THE LITIGATION.** The
 16 obligation to pay \$150,000.00 will be reflected by a promissory note for \$150,000.00 and must
 17 be executed by a person or entity with sufficient financial resources to satisfy the Trustee and the
 18 Court that the obligation will be paid when due.

19 16. The Trustee further proposes that bidding increase in increments of \$10,000.
 20 Thus the first overbidder would be required to pay \$10,000 and accept the obligation of paying
 21 an additional \$150,000; a subsequent overbidder would be required to pay \$20,000 and accept
 22 the obligation of paying an additional \$150,000, etc.

23 17. If there are multiple overbids (i.e., a bidding battle among two or more parties),
 24 the Trustee proposes that any backup offers which the Court might choose to approve should be
 25 approved for the bidder's initial offer—not the highest offer before the winning bid. The
 26 purpose of this provision is to ensure that overbidders do not bid the price up without an
 27 intention to perform, in order to force other overbidders to bid amounts which they would not
 28 have agreed to pay absent the winning overbidder's bad faith bid(s).

1 WHEREFORE, Trustee prays for an order approving the sale of the Claims on the terms
2 stated herein, for such other and further relief as the Court deems appropriate.
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4 Dated: August 18, 2011

5 **HUGHES LAW CORPORATION**

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7 By: /s/Gregory J. Hughes
8 Gregory J. Hughes, Attorney for
9 Trustee Thomas A. Aceituno
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